

E-FILED: May 10, 2012

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ONEWEST BANK, FSB,

No. C12-01090 HRL

Plaintiff,

**ORDER THAT CASE BE REASSIGNED
TO A DISTRICT JUDGE**

v.

**REPORT AND RECOMMENDATION RE
REMAND TO STATE COURT**

JIM FERRIER and DOES 1-5,

Defendants.

On March 2, 2012, Vilma Visitacion-Fernandez removed this case from the Santa Clara County Superior Court. Visitacion-Fernandez says that she was never served with the complaint,¹ and she did not append a copy of the complaint to the notice of removal. Nevertheless, the record presented indicates that this action is one for unlawful detainer. For the reasons stated below, the undersigned recommends that this matter be remanded to the state court.

Removal to federal court is proper where the federal court would have original subject matter jurisdiction over the complaint. 28 U.S.C. § 1441. The removal statutes are strictly

¹ On the record presented, Visitacion-Fernandez's connection to these proceedings is unclear. The notice of removal includes a signature block for defendant Jim Ferrier, who is identified as "Attorney for Defendant." The removal notice, however, is not signed by Ferrier and is signed only by Visitacion-Fernandez. Appended to the removal notice is a document titled "Declaration of Jim Ferrier," and states that Ferrier has an affirmative action for wrongful foreclosure pending before the Los Angeles County Superior Court pertaining to real property in Milpitas, California. The declaration is unsigned by Ferrier. Instead, the declaration is signed only by Visitacion-Fernandez who apparently handwrote her signature block onto the declaration.

1 construed against removal and place the burden on the defendant to demonstrate that removal
 2 was proper. Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009)
 3 (citing Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)). The court has a continuing duty
 4 to determine whether it has subject matter jurisdiction. FED. R. CIV. P. 12(h). A case must be
 5 remanded to the state court if it appears at any time before final judgment that the court lacks
 6 subject matter jurisdiction. 28 U.S.C. § 1447(c).

7 Visitacion-Fernandez fails to show that removal is proper based on any federal law.
 8 Federal courts have original jurisdiction over civil actions “arising under the Constitution, laws,
 9 or treaties of the United States.” 28 U.S.C. § 1331. A claim “arises under” federal law if, based
 10 on the “well-pleaded complaint rule,” the plaintiff alleges a federal claim for relief. Vaden v.
 11 Discovery Bank, 129 S. Ct. 1262, 1272 (2009). Defenses and counterclaims asserting a federal
 12 question do not satisfy this requirement. Id. As noted above, the papers appended to the notice
 13 of removal indicate that this is an action for unlawful detainer. Visitacion-Fernandez claims
 14 that there is a “federal question surrounding the construction of the Pooling and Service
 15 Agreement” of the subject mortgage and that plaintiff has violated the Fourteenth Amendment
 16 to the U.S. Constitution in foreclosing on the property. (Notice of Removal at 3). She further
 17 alleges that the instant action is related to another case filed in this district.² There is no
 18 indication, however, that any claims arising under federal law were asserted in the underlying
 19 unlawful detainer complaint. And, allegations in a removal notice or in a response to plaintiff’s
 20 complaint cannot provide this court with federal question jurisdiction.

21 Nor does this court have diversity jurisdiction over the matter. Visitacion-Fernandez
 22 says that the amount in controversy exceeds \$75,000. It is not readily apparent that is true, the
 23 action evidently having been designated a “Limited Civil Case.”³ In any event, the removal
 24 notice states that defendant is a citizen of California. (Notice of Removal at 3). An action may
 25 not be removed on the basis of diversity “if any of the parties in interest properly joined and

26 ² See C12-01081PSG *Visitacion-Fernandez v. First Fed. Bank of California, et*
 27 *al.*


28 ³ The state court's website (www.scsccourt.org) indicates that such actions are
 those involving \$25,000 or less.

1 served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. §
2 1441(b)(2); see also Spencer v. U.S. Dist. Ct., 393 F.3d 867, 870 (9th Cir. 2004) (“It is thus
3 clear that the presence of a local defendant at the time removal is sought bars removal.”).

4 Because the parties have yet to consent to the undersigned’s jurisdiction, this court
5 ORDERS the Clerk of the Court to reassign this case to a District Judge. The undersigned
6 further RECOMMENDS that the newly assigned judge remand the case to the Santa Clara
7 County Superior Court. Pursuant to Federal Rule of Civil Procedure 72(b), any party may serve
8 and file objections to this Report and Recommendation within fourteen days after being served.

9 SO ORDERED.

10 Dated: May 10, 2012

11 
12 _____
13 HOWARD R. LLOYD
14 UNITED STATES MAGISTRATE JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

1 5:12-cv-01090-HRL Notice sent by U.S. Mail to:

2 Jim Ferrier
3 372 Daisy Drive
4 San Jose, CA 95123

5 Vilma Visitacion-Fernandez
6 372 Daisy Drive
7 San Jose, CA 95123

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28